



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

March 4, 2003

Ms. Jeanine A. Cadena  
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1717 Main Street, Suite 4300  
Dallas, Texas 75201

OR2003-1392

Dear Ms. Cadena:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177352.

The McKinney Economic Development Corporation ("MEDC"), which you represent, received a request for the following information:

documents relating to the contract signed between [MEDC] and Nashville Jet Center ["Nashville Jet"] including, but not limited to, any promissory note, contract, performance criteria, sight [sic] plan, business plan, directive or suggestion from any City employee, its attorney or elected official . . . [and] the original offer made to Nashville Jet several months ago that was modified.

You state that some responsive information has been released to the requestor. You also state that MEDC does not have a site plan that is responsive to the request.<sup>1</sup> You claim that

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<sup>1</sup>The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ diss'd); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

a portion of the requested information is excepted from disclosure under sections 552.107, 552.110, and 552.111 of the Government Code.

Pursuant to section 552.305, you indicate that you notified Nashville Jet, the party with a proprietary interest in the information, of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments made on the requestor's behalf. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this ruling, no response has been received from Nashville Jet. Because the interested third party did not submit arguments in response to the section 552.305 notice, the third party has provided us with no basis to conclude that the information at issue is excepted from disclosure under section 552.110. *See Open Records Decision Nos. 639 at 4 (1996)* (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 542 at 3 (1990). Therefore, we will address MEDC's arguments against disclosure of the information at issue.

Initially, we note that the submitted documents contain information that falls within the purview of section 552.022(a)(5). Section 552.022(a)(5) provides that "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]" are not excepted from required disclosure unless they are made expressly confidential by law. A portion of the Prospect Proposal #02-04 falls under this category of information. MEDC contends that sections 552.110 and 552.111 of the Government Code make this information confidential. However, section 552.111 is a discretionary exception to disclosure that protects the

governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111). Thus, the information subject to the purview of section 552.022 may not be withheld under section 552.111 of the Government Code. MEDC also claims that section 552.110 excepts from public disclosure the information at issue. As section 552.110 is designed to protect the interests of third parties, we will address MEDC's claim under that section for the information subject to section 552.022 along with the remaining submitted information.

We note that you assert that Nashville Jet considers the requested information as confidential, and therefore it should not be released. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

MEDC argues that a portion of the submitted information is excepted from public disclosure under section 552.110 of the Government Code as commercial or financial information, the disclosure of which would cause substantial competitive harm to Nashville Jet. Section 552.110(b) protects the property interests of private persons by excepting from disclosure commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). You assert that release of the information at issue "where it may become available to other airports at which Nashville Jet may seek to build [a fixed base operation] in the future, would have a serious detrimental impact on the

competitive position of Nashville Jet[.]” Upon review of the arguments you submitted to this office, we conclude that MEDC has failed to provide a specific factual or evidentiary showing that substantial competitive injury to the third party would likely result from disclosure of the information at issue. Thus, we conclude that MEDC has not sufficiently demonstrated how any of the submitted information is excepted from disclosure as commercial or financial information under section 552.110(b).

You also seek to withhold a portion of the submitted information under section 552.107(1) of the Government Code as information protected by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication

has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Upon review of your representations and the information at issue, we agree that some of the documents you seek to withhold under the attorney-client privilege consist of confidential communications between MEDC staff and its representatives and MEDC's attorneys. We have marked the information that MEDC may withhold under section 552.107(1) of the Government Code.

You also argue that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). We note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). Upon review of your representations and the information at issue, we agree that some of the submitted documents contain advice, recommendations, opinions, and other material reflecting the policymaking processes of

MEDC. We conclude that MEDC may withhold this information, which we have marked, pursuant to section 552.111 of the Government Code. We note, however, that a portion of the information you seek to withhold under section 552.111 does not consist of advice, opinion, or recommendations regarding MEDC policymaking matters. This information is not excepted from disclosure under section 552.111.

The submitted information also contains e-mail addresses of members of the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. MEDC must, therefore, withhold e-mail addresses of members of the public under section 552.137. We have marked the types of information that must be withheld under section 552.137.

Finally, we note that some of the materials at issue may be protected by copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the information that MEDC may withhold under sections 552.107(1), 552.111, and 552.137. The remaining submitted information must be released to the requestor in compliance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 177352

Enc. Submitted documents

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